ORIGINAL

No. 86-6109

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FREDERICK MATHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to an entrapment instruction at his trial.

2. Whether the trial court's finding that the prosecutor did not exercise her peremptory challenges on racial grounds was clearly erroneous.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 101-108) is reported at 803 F.2d 325.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1986. A petition for rehearing was denied on October 29, 1986. The petition for a writ of certiorari was filed on December 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of accepting a gratuity as a public official, in violation of 18 U.S.C. 201(g). He was sentenced to a three-year term of probation. The court of appeals affirmed (Pet. App. 101-108).

1. The evidence at trial showed that between 1982 and 1985, petitioner worked at the Milwaukee office of the Small Business

Administration, where he was in charge of a program designed to aid businesses owned by socially and economically disadvantaged persons. */ Under that program, the SBA obtained government contracts as a primary contractor and subcontracted the work to the businesses targeted by the program. Pet. App. 102.

James DeShazer operated the Midwest Knitting Mills, one of the businesses in the SBA program. Petitioner was DeShazer's main contact at the SBA. Beginning in 1982, petitioner repeatedly asked DeShazer for money to ease his personal financial problems. In 1983, DeShazer lent petitioner $1,500 to enable petitioner to pay his daughter's college expenses. Later, DeShazer lent petitioner $1,200 to enable petitioner to make a mortgage payment. During 1984, petitioner repeatedly asked DeShazer for more money. Pet. App. 102.

During the samer period, Midwest Knitting Mills was having difficulty in fulfilling its contracts and in obtaining advance payments for its products. DeShazer complained to one of his customers, the Defense Department, that he believed that he was being denied advance payments because he had not given petitioner money. The Defense Department reported the allegation to the FBI, which proceeded to investigate the complaint. DeShazer agreed to assist the FBI by recording his conversations with petitioner.

In a February 1985 meeting, DeShazer reminded petitioner that petitioner had asked him for a $4,200 loan. DeShazer told petitioner that he had arranged for a $12,000 loan from which he would give petitioner $4,200. During the next few weeks, DeShazer met or telephoned petitioner several times to discuss his company's financial problems. During one of those meetings, DeShazer told petitioner that because of his own financial prob-

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*/ The summary of the evidence is based principally on the statement of facts in the government's brief in the court of appeals.

lems he would only be able to give petitioner half of the $4,200. On April 23, DeShazer gave petitioner $2,100 at a hotel coffee shop. Petitioner cautioned DeShazer not to mention the money to anyone. Petitioner was arrested as he left the restaurant.

Petitioner testified that he took the $2,100 from DeShazer on the understanding that it was a personal loan and unrelated to petitioner's efforts to secure advance payments for DeShazer's company. Petitioner explained that by November 1984, he no longer had any responsibility over DeShazer's business at the SBA because another official had assumed those duties. Beginning in February 1985, petitioner said, DeShazer repeatedly offered to lend him money because of petitioner's financial problems. Petitioner said he finally accepted the money, but that he cautioned DeShazer not to mention the loan because it would be misconstrued by his supervisors. Petitioner admitted that he had borrowed $1,500 from DeShazer to pay his daughter's college expenses. He said, however, that he had repaid a portion of that loan and that he had never borrowed any more money from DeShazer.

Petitioner requested that the district court charge the jury on the defense of entrapment. The district court denied the request on the ground that petitioner had testified that he had accepted the money without criminal intent, and that he therefore could not present the inconsistent defense of entrapment. The court also remarked that the evidence showing entrapment was "shaky at best."

2. The court of appeals affirmed (Pet. App. 101-108). It held that the trial court correctly denied petitioner's effort to present an entrapment defense to the jury. Adhering to prior circuit precedent, the court reasoned that a defendant cannot simultaneously claim that he had no intent to commit a crime and that he was entrapped into committing it. Pet. App. 102-103.

ARGUMENT

1. Petitioner contends (Pet. 6-15) that the trial court erred by refusing to instruct the jury on the defense of entrapment. He contends that there is a conflict among the circuits over whether a defendant can present inconsistent defenses to the jury by simultaneously denying commission of the crime and asserting that he was entrapped into committing it. That conflict is not presented in this case, however, because petitioner would not have been entitled to an entrapment instruction under the law of any circuit. Even viewing the evidence in the light most favorable to petitioner, there was no basis on which a jury could conclude that the government induced him to commit a crime.

A defendant is entitled to an instruction on an affirmative defense only if the evidence meets minimum standards as to each element of the defense. United States v. Bailey, 444 U.S. 394, 415 (1980); United States v. Stanley, 765 F.2d 1224, 1234 (5th Cir. 1985). A defendant is entitled to an entrapment instruction only if there is some evidence that (1) a government agent induced him to commit the crime, and (2) the defendant was not otherwise predisposed to commit the crime. United States v. Goodacre, 793 F.2d 1124, 1125 (9th Cir. 1986); United States v. Woosley, 761 F.2d 445, 448 (8th Cir. 1985). It is not enough for the defendant to show that the government offered the defendant an opportunity to commit the crime; the evidence must show that the defendant was in some way coerced, pressured, or persuaded to commit the offense. United States v. Ortiz, 804 F.2d 1161, 1165 (10th Cir. 1986); United States v. Luce, 726 F.2d 47, 49 (1st Cir. 1984); United States v. Bagnell, 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983).

The evidence in this case showed only that DeShazer offered petitioner money. DeShazer never coerced or pressured petitioner into accepting the money. Moreover, petitioner never expressed any reluctance to accept it. Even if petitioner accepted the

money only because he was experiencing financial difficulties, an offer of an opportunity to commit a crime is not converted into unlawful inducement merely because the defendant was in financial distress. See United States v. Stenberg, 803 F.2d 422, 432 (9th Cir. 1986); United States v. Dion, 762 F.2d 674, 689 (8th Cir. 1985).

Where, as here, the defendant has not met his initial evidentiary burden, he is not entitled to an entrapment instruction. See, e.g., United States v. Ortiz, 804 F.2d at 1166; United States v. Sarmiento, 786 F.2d 665, 667 (5th Cir. 1986). Thus, regardless of whether a defendant should be permitted to assert inconsistent defenses in an entrapment case, the district court properly refused to give an entrapment charge in light of the absence of any evidence to support that defense.

2. Petitioner also contends (Pet. 15-16) that the district court erred in finding that the prosecutor did not intentionally discriminate against black veniremen in exercising peremptory challenges. This fact-bound question does not merit review.

a. During voir dire, the prosecutor used her peremptory challenges to strike all three black veniremen from the jury. During a hearing following petitioner's objection, the prosecutor explained the reasons she had done so. She pointed out that the first juror had expressed deep reservations about the use of tape-recorded evidence. The second juror, the prosecutor stated, did not appear to take a sufficient interest in the proceedings; in support of that conclusion, the prosecutor observed that the juror had arrived late and appeared inattentive during the jury selection process. As to the third juror, the prosecutor said that she felt that he was staring at her during voir dire and was expressing what she took to be hostility. As a result of that juror's behavior during voir dire, the prosecutor concluded that the juror would either be "very strongly in support of my position or he was going to be very strongly against my position."

As a result, she said, "I felt that there were other jurors who more fit the profile of a juror that I was looking for." Pet. App. 106-107.

The district court accepted the prosecutor's explanation. Striking the first juror, the court found, was "well justified" for the reason given. The court agreed with the prosecutor that the second juror had demonstrated an apparent lack of interest in the proceedings. And the court credited the prosecutor's explanation for stiking the third juror, even though the court had not observed any sign of hostility on the juror's part. The court also noted that the key witnesses on both sides were black, that the prosecutor had not engaged in a practice of striking blacks from the jury in cases in which the defendant was black, and that from the methodical way in which the prosecutor exercised her peremptory challenges, it appeared that her strikes were based on a number of factors and not on a desire to remove all blacks from the jury. Pet. App. 106-108.

b. The court of appeals upheld the district court's finding that the prosecutor did not improperly use her peremptory challenges to strike blacks from the jury. The court found that the prosecutor's response to the charge that she had based her peremptory challenges on racial factors "contained legitimate reasons, was clear, was reasonably specific, and was related to the particular case" (Pet. App. 108). Moreover, the court noted that the trial judge had considered "all relevant circumstances" in finding that petitioner had not carried his ultimate burden of proving discriminatory intent (ibid.). Applying the standards announced in Batson v. Kentucky, No. 84-6263 (Apr. 30, 1986), the court of appeals found no basis for concluding that the district court's finding on the issue of the prosecutor's intent was clearly erroneous.

c. In Batson v. Kentucky, supra, this Court held that the Equal Protection Clause bars a prosecutor from exercising his

peremptory challenges against potential jurors on account of their race. It further held that once a defendant makes a prima facie case of discriminatory use of peremptory challenges, the burden shifts to the government to show a neutral explanation for the challenges. A prosecutor must then "articulate a neutral explanation related to the particular case to be tried." Batson, slip op. 17. Because the issue of intentional racial discrimination is factual, the Court noted that reviewing courts should give "great deference" to a trial court's findings on the issue. Id. at 18 n. 21.

Here, the prosecutor gave a "neutral explanation" for the use of her challenges. She explained that the first juror would not have fairly accepted the use of tape recorded evidence, the second was not committed to the proceedings, and the third was seemingly hostile toward her. The district court's conclusion that the prosecutor did not engage in intentional racial discrimination in the use of her challenges was manifestly justified. Moreover, as the court of appeals noted, the prosecutor's explanation of the legitimate reasons for her challenges -- even though given before Batson was decided -- was a model of the kind of clear, specific explanation that Batson envisions. The concurrent factual findings of the two lower courts on this issue warrant no further review. See Tiffany Fine Arts v. United States, 469 U.S. 310, 317-318 & n.5 (1985).

Petitioner contends (Pet. 15) that the prosecutor's explanation for challenging the third juror -- because he appeared to be hostile to her -- is inadequate under Batson. But Batson does not suggest that subjective impressions may not be a legitimate basis on which to exercise peremptory challenges. Batson simply forecloses the prosecutor from exercising challenges on the basis of race: on the "assumption -- or his intuitive judgment -- that [the challenged jurors] -- would be partial to the defendant because of their shared race." Batson, slip op. 17. As the

district court and the court of appeals found, the prosecutor's judgment in this case was not based on any such assumption.

Petitioner also contends that the prosecutor's reasons for striking the first two black jurors was invalid because there was a white juror who was late but was not struck, and because there was a white juror who expressed reservations about tape-recorded evidence but was not struck (Pet. 5, 15-16). As the prosecutor explained (Pet. App. 106), she struck several persons who had expressed reservations about tape-recorded evidence; the fact that she failed to strike one white juror who expressed such reservations is hardly probative of racial animus. As to the second juror, the prosecutor did not strike her simply because she was late. The prosecutor struck that juror because she seemed uninterested in the proceedings; her lateness was only one factor contributing to that judgment (see Pet. App. 106). The fact that a white juror was also late therefore does not support petitioner's claim that the prosecutor exercised her peremptory challenges on racial grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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